Nos. 1 and 2, I allow their application in the same way as that of defendant No. 3. In respect of that application concerning paragraph 7 of the claim, I hold that there is some cause of action disclosed. Here I will order no costs, and costs will be costs in the cause.

Order accordingly.

Solicitors: *T. K. Tang & Co.; Braddell & Ramani; Eugene Lye & Co.*

MAK KOON YONG & ANOR. v. MUNICIPAL COUNCILLORS, MALACCA

[O.C.J. (Wan Suleiman J.) January 4, 1967]

[Malacca — Civil Suit No. 37 of 1963]

Local Authority — Discretionary power — Improper exercise of — Refusal to pass amended plan — Whether ultra vires the Ordinance — Failure to have recourse to remedy specified in Ordinance — Municipal Ordinance (S.S. Cap. 133), s. 144.

Limitation — Suit against a body corporate — Protection afforded by Public Authorities Protection Ordinance, 1948, s. 2(a).

The plaintiffs are the registered owners of a piece of land situated within the municipal boundary. They alleged that in December 1960 the then municipal engineer informed their architect that the defendants had approved their application to erect 10 units of buildings shown on plan No. 8720, provided that septic tanks were re-sited. They alleged that the plan showed the front of the buildings to be of the ordinary dwelling house type, but the defendants contended that the plan as a whole showed that the buildings to be erected were of the dwelling house type.

It was common ground that the plaintiffs completed 7 of the 10 units shown on the plan, and that they departed from the passed plan when they constructed fronts of the ground floor of the buildings for use as shops closed by shutters and collapsible iron gates. The defendants contended that in departing from the original plan, the plaintiffs had altered entirely the nature of the user of the buildings.

In November 1961 the plaintiffs' architect submitted to the defendants plan No. 9322 showing departure from passed plan 8720 and in December 1961 the municipal engineer returned plan 9322 to the architect stating that the "application was refused as the proposed buildings were originally intended for dwelling purposes only, and conversion into shophouses necessitates provision of 20 ft. service road which is not possible." Plaintiffs then made a personal application to the President of the Municipal Council and their architect wrote to the municipal engineer in January 1962. The engineer replied stating that the defendants had already considered the plaintiffs' previous applications and that the waiver of a 20 ft. service road was not possible.

There followed various protracted correspondence, the engineer replying the matter was still "under consideration". Finally on May 21, 1962 the plaintiffs' solicitor wrote pointing out that they were suffering loss by the delay in finalising the issue. On June 27, 1962 the municipal engineer wrote to the plaintiffs' architect informing him that the "Councillors have approved the amendment as shown in the plan."

In this action the plaintiffs claimed, *inter alia*, "a declaration that the defendants' disapproval of amended plan No. 9322 to passed plan No. 8720 was wrongful and *ultra vires* and by maintaining their wrongful disapproval and wrongful or neglecting to approve the aforesaid amended plan despite repeated requests until 27th June 1962, had caused loss to plaintiffs, and also claimed general and special damages." The defendants contended that they acted at all material times reasonably and in *bona fide* exercise of their duties and powers as municipal councillors and they denied liability in damages.

The following issues of law were raised: (1) were the defendants acting *ultra vires* the Ordinance in refusing to pass plan No. 9322? (2) were the plaintiffs guilty of an offence under section 144 of the Municipal Ordinance when they departed from passed plan No. 8720 without the written permission of the municipal councillors and therefore could they claim damages in respect of and arising out of their illegal acts? (3) would plaintiffs, who have failed to have recourse to the remedy specifically provided by section 144 of the Ordinance be precluded from complaining against defendants or from claiming any damages which may arise out of their failure to pursue their proper remedy? and (4) was the action barred by limitation under the Public Authorities Protection Ordinance, 1948?

Held: (1) the defendants, in refusing to pass the amended plan, were acting *ultra vires* the Ordinance;

(2) there was no point in pursuing the second issue since it was clear that the plaintiffs' contention was that their cause of action arose out of the refusal to approve the amended plan;

(3) the answer to the third issue would also be the answer to the second issue;

(4) time would begin to run for the purposes of the Public Authorities Protection Ordinance from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased. If the refusal to approve the amended plan by the defendants was actionable, there had indeed been a continuation of the act, and therefore the plaintiffs were correct in saying that the act causing damage ceased only from June 27, 1962. It followed that this suit was not time-barred. However in view of the answer to the third issue of law above, the fact that the suit was not time-barred could not affect the action;

(5) there was no cause of action and the suit was dismissed with costs.

Per curium: Even where the specific remedy provided is for failure to perform, or in this case the improper exercise of a discretionary power, the court would have to seek the intention of the legislature . . . the obvious intention is to exclude an actoin for damages.

Cases referred to:—

(1) *Pasmore & Ors.* v. *The Oswaldtwistle Urban District Council* [1898] A.C. 387.

(2) *Robinson* v. *The Mayor & Corporation of the Borough of Workington* [1897] 1 Q.B. 619.

(3) *Atkinson* v. *Newcastle & Gatehead Waterworks Co.* (1876-7), 2 Ex. D. 441; [1874-80] All E.R. Rep. 757.

(4) *Davis* v. *Bromley Corporation* [1908] 1 K.B. 170.

(5) *Asok Kumar David* v. *Abdul Cader* [1963] 3 All E.R. 579.

(6) *Carey* v. *Metropolitan Borough of Bermondsey*, 20 T.L.R.

CIVIL SUIT.

W. H. Sault for the plaintiffs.

Ng Ek Tiong (*Vincent Ponniah* with him) for the defendants.

Cur. Adv. Vult.

Wan Suleiman J.: This is an action filed by the plaintiffs who claim to be the registered owners of a piece of land held under State Grant No. 31344 No. 60[11] Town Area XXXI Bachang Road, Malacca, situated within the municipal boundary, against the Municipal Councillors of Malacca.

On their pleadings, the plaintiffs alleged that on or about 15th December 1960, the then municipal engineer informed the plaintiffs' architect that the defendants had approved the plaintiff's application to erect 10 units of the buildings shown in Plan No. 8720, provided that the septic tanks were re-sited. Whilst the plaintiffs alleges that this plan showed the front of the buildings to be of the ordinary dwelling house type, the defendants in their amended defence contend that the plan as a whole showed that the buildings to be erected were of the dwelling house type.

It is common ground that the plaintiffs completed 7 of the 10 units shown on the plan, though there is no admission as to the actual date of such completion. It is also common ground that the plaintiffs departed from the passed plan, i.e. plan No. 8720 when they constructed fronts of the ground floor of the buildings for use as shops closed by shutters and collapsible iron gates.

The defendants' amended defence further contended that in so departing from the original passed plan, the plaintiffs had altered entirely the nature of the user of the building.

The defendants also argued that plaintiffs had prior to submitting their plans called at the municipal offices and enquired as to the requirements of the municipality in respect of the siting of the buildings on the land in the event of the said land being developed by the erection of shop houses thereon, and had been informed that it was the practice of the municipality to require a service road to be provided in front of the shop houses but that in the case of dwelling houses such a service road would not be insisted upon. Plaintiffs in their amended reply, however, denied ever having made such enquiries.

It is again common ground that on or about 8th November 1961 plaintiffs' architect submitted to the defendants plan No. 9322 showing the departure from passed plan No. 8720, and that on or about the 23rd day of December 1961 the municipal engineer returned the plan No. 9322 to the plaintiffs' architect stating *inter alia*:—

> "I have to inform you that your application is refused as the proposed buildings were originally intended for dwelling purposes only, and conversion into shophouses necessitates provision of 20 ft. service road which is not possible."

Plaintiffs then made a personal application to the President of the Municipal Council, and the plaintiffs' architects then wrote to the municipal engineer on or about 18th January, 1962.

On 25th January 1962, the municipal engineer replied to the plaintiffs' architects stating that the defendants had already considered the plaintiffs' previous application and that the waiver of a 20 ft. service was not possible.

There then followed an application by the 1st plaintiff by letter dated 8th February 1962, addressed to the President of the Municipal Council, and then plaintiffs were informed by the municipal engineer that their application would be considered on the 9th of March 1962.

On 27th March 1962 in answer to 1st plaintiff's enquiry as to the result of the defendants' decision, he was informed that the matter had been deferred to the 4th of April 1962.

On 5th April 1962, the 1st plaintiff was informed that the matter had been further deferred.

Following correspondence between the plaintiffs and their solicitors and the municipal secretary, the municipal secretary stated on 5th May 1962 that the matter was still "under consideration".

In answer to the plaintiff's solicitor's letter of the 21st May 1962, pointing out that the plaintiffs were suffering loss by the delay in finalising the issue, the municipal secretary replied that the matter was "receiving attention".

On 27th June, 1962, the municipal engineer wrote to plaintiffs' architect informing him that the "Councillors have approved the amendment as shown in the plan".

The plaintiffs *inter-alia* claim:—

> (a) A declaration that the defendants' disapproval of amendment plan No. 9322 to passed plan No. 8720 was wrongful and *ultra vires* and by maintaining their wrongful disapproval and wrongfully refusing or neglecting to approve the aforesaid amended plan despite repeated requests until 27th June 1962, had caused loss to plaintiffs, and also claimed general and special damages.

The defendants contended in para 6 of their amended defence that they acted at all material times reasonably and in *bona fide* exercise of their duties and powers as municipal councillors and are not liable to the plaintiffs in any damages.

Counsel on both sides agreed that the point of law raised by the defendants should be argued and disposed of before the trial. These issues of law appear in paragraphs 5, 6 and 7 of the amended defence.

These issues of law may be summarised as follows:—

> (1) Were the defendants acting *intra vires* the Ordinance in refusing to pass amended plan No. 9322?

(2) Were the plaintiffs guilty of an offence under section 144 of the Municipal Ordinance when they departed from the passed plan No. 8720 without the written permission of the municipal councillors and therefore could they claim damages in respect of and arising out of their illegal acts?

(3) Would plaintiffs, who have failed to have recourse to the remedy specifically provided by section 144 of the Ordinance be precluded from complaining against defendants or from claiming any damages which may arise out of their failure to pursue their proper remedy? and

(4) Was the action barred by limitation under the Public Authorities Protection Ordinance 1948?

It would be advisable to dispose of issue No. 2 summarily. I do not think there is any point in pursuing this issue since it is clear that plaintiffs' contention is that their cause of action arose out of refusal to approve amended plan No. 9322. In short, the answer to issue No. 3 would be also the answer to issue No. 2.

Coming now to the first issue, it is my view that the defendants, in refusing to pass the amended plan, were acting *ultra vires* the Ordinance. Indeed it was never suggested by the defendants that any provision of the Municipal Ordinance or building by-laws made thereunder required the provision of a 20 ft. service road as a prerequisite to the approval of a plan to build shop-houses. In *Walter's* commentary on the Municipal Ordinance of the Straits Settlement at page 212, the learned author is of the view that, despite the word "may" in section 144(1) of the Ordinance, the Commissioners may properly disapprove a plan only if the plan infringes the Ordinance or a valid by-law made thereunder. With this view I am in full agreement.

Mr. Ng Ek Tiong for the defendants argued that being dissatisfied with the non-approval or delay in approving the amended plan, the proper course for the plaintiffs to take was to apply to the State Authority, i.e. the Governor-in-Council as provided for in section 144(13) of the Ordinance.

It seems to me that mere inaction by the defendants would not be subject to *mandamus* for the remedy of reference to the Governor-in-Council or State Authority, as provided by section 144(13) of the Ordinance. I find support for this view in the case of *Pasmore and Others* v. *The Oswaldtwistle Urban District Council* [1] at p. 387 thereof appears the following passages:—

"The duty of a local authority, under section 15 of the Public Health Act 1875, to make such sewers as may be necessary for effectually draining their district for the purposes of that Act, cannot be enforced by an action for mandamus brought by a private person; the only remedy for neglect of the duty is that given by section 299 of the Act, a complaint to the Local Government Board".

In *Robinson* v. *The Mayor and Corporation of the Borough of Workington,* [2] which was an action to recover damages from the defendants a local authority, for not effectually carryng out their duty under the same section of the Act, Lord Esher M.R. said at page 621:—

"If it were not for the statute, there would be no duty on the defendants to do anything in the matter, and a default on their part is dealt with by a remedy provided by the same statute. I have no hesitation in saying that that is the only remedy which is available. It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. The remedy in this case is under section 299, which points directly to section 15, and shews what is to be done for default of the duty imposed by that section. That is not the remedy sought for in this action, which is brought to recover damages".

I am fully aware that these authorities deal with duties imposed upon a local authority by statute. It may well be argued that the facts of the present action does not arise out of any failure to perform such a statutory duty, but is rather the improper exercise of a discretionary power.

An authority which is more to the point is the case of *Atkinson* v. *Newcastle & Gatehead Waterworks Co.* [3] I need refer only to the headnote which reads as follows:—

"The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.

By the Waterworks Clauses Act, 1847, the undertakers are: (1) to fix and maintain fire-plugs: (2) to furnish the town commissioners a sufficient supply of water for certain public purposes; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure and to allow all persons at all times to use the same for extinguishing fire without compensation; and (4) to supply to every owner or occupier of any dwelling house, having paid or tendered the water rate, sufficient water for domestic purposes.

By section 43 a penalty of £10 (recoverable summarily before two justices, who may award not more than half the penalty to the informer and are to give the remainder to the overseers of the parish) is imposed on the undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or ratepayers a penalty of 40s. a day for each day during which such neglect continues after notice in writing of non-supply.

The plaintiff brought an action for damages against a waterworks Co. for not keeping their pipes charged as required by the Act, whereby his premises situated within the limits of the defendant's Act were burnt down:— **Held** (reversing the decision of the Court of Exchequer) that the statute gave no right of action to the plaintiff".

In the case of *Davis* v. *Bromley Corporation,* [4] on which counsel for defendants had sought to rely to support their contention that an action will not lie against the defendants, even if the exercise of their powers had not been *bona fide,* and the plaintiff's only remedy, if defendants had not made a true or *bona fide* exercise of their authority, was to apply for a *mandamus* to have his application properly heard and determined.

Davis v. *Bromley Corporation* was not followed in the Privy Council decision of *Asok Kumar David* v. *Abdul Cader* [5] wherein their Lordships held that assuming that the appellant in the case had done all that was required to qualify him for a grant of licence, the respondent owed some duty to the appellant with regard to the execution of the statutory powers and if the respondents had in fact acted maliciously in refusing the licence, the action might lie.

Had the Ordinance no statutory remedy such as provided in section 144(13), the effect of this decision would dispose of the third issue of law in favour of the plaintiffs.

However, the existence of this statutory remedy poses the question — Does the plaintiff have a right to elect between such statutory remedy and an action for damages?

I have not been able to discover any decided case which would assist in providing an answer to the above question. However in the 5th Edition of *Hart's* Introduction to the Law of Local Government and Administration appears the following passage:—

"The discovery of the statutory intention is a matter of construction and no definite rules can be laid down in this confusing and necessary branch of the law. It is however clear that the provision by the statute of a specific remedy for a failure to perform the duty imposed by it, tend to show its intention to exclude an action for damages, and this is even so when the specific remedy is an extra-judicial one, as by an appeal to a Minister or resort to default powers such as those contained in the Public Health Act, 1875".

This passage inclines me to the view that even where the specific remedy provided is for faliure to perform, or in this case the improper exercise of a discretionary power, the court would have to seek the intention of the legislature. I am of the view that the obvious intention is to exclude an action for damages.

Lastly, I shall consider the defence of limitation. Under section 6(2) of the Ordinance the defendants constitute a body corporate, and read in conjunction with the definition of "persons" in the Interpretation and General Clauses Ordinance 1948, they would, obviously, come within the protection of the Public Authorities Protection Ordinance 1948. The defendants argue that this suit is time-barred since section 2(a) of the above Ordinance would apply. The relevant part of that section reads as follows:—

"2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof;"

In the case of *Carey* v. *Metropolitan Borough of Bermondsey* [6] Court of Appeal held in respect of that section of the English Act which is *in pari materia* with our section 2(a) that "the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage." Time would therefore begin to run for the purposes of the Ordinance, from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.

For the defendants it was submitted that the time began to run from 23rd December 1961, the day on which plaintiffs' architect was informed by the municipal engineer that the amended plan No. 9322 would not be approved. On behalf of the plaintiffs it was argued that time began to run only from 27th June 1962 when the municipal engineer approved the amended plan. Until then there had been a continuation of the refusal, the act which they claim caused the damage. Since the writ was issued on 27th April 1963 plaintiffs contended that the suit had been commenced within time.

If the refusal to approve the amended plan, by the defendants was actionable, it is my view that there had indeed been a continuation of the act, and that therefore the plaintiffs were correct in saying that the act causing damage ceased only from 27th June 1962. It would then follow that this suit is not time-barred cannot affect the outcome.

However, in view of the decision I arrive at, as regards the third issue of law, the fact that the suit is not time-barred cannot effect the outcome.

I find that there is no cause of action and the suit is dismissed with costs.

Action dismissed.

Solicitors: *Sault, Keith Sellar & Co.; Braddell & Ramani.*

LUE THIAN SOO v. S. MOHAMED NATHAR & CO.

[O.C.J. (Wan Suleiman J.) January 8, 1967]

[Kota Bharu — Civil Suit No. 111 of 1964]

Landlord and Tenant — Notice to quit served when Ordinance not in force — Continued possession — Statutory tenant — Control of Rent Ordinance, 1956, ss. 1(3), 20(a).

Legislation — Control of Rent Ordinance — Failure to keep in force — Control of Rent (Application to Kelantan) Enactment, 1964 — Retrospective effect.

Section 1(3) of the Control of Rent Ordinance, 1956 requires the Ruler in Council of a State to make an